JD(SF)–38–04
Las Vegas, NV

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO BRANCH OFFICE
DIVISION OF JUDGES

SAM'S CLUB, A DIVISION OF
WAL-MART STORES, INC.

and

UNITED FOOD AND COMMERCIAL
WORKERS INTERNATIONAL
UNION, AFL-CIO, CLC

Cases 28-CA-17057
28-CA-17058
28-CA-17059
28-CA-17150
28-CA-17152
28-CA-17194
28-CA-17273
28-CA-17276
28-CA-17309
28-CA-17602
28-CA-17970

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SUPPLEMENTAL DECISION

On November 29, 2002, I issued a decision in this matter concluding that the Respondent had engaged in certain unfair labor practices and recommending remedial action. On March 23, 2004, the Board (Chairman Battista dissenting) remanded the case to me "for additional credibility determinations, factual findings, and legal analysis" as to certain specified allegations in the consolidated complaint.

Thereafter, over Counsel for General Counsel's objection, I granted the Respondent's motion to submit a brief on the issues to be considered on remand. All parties filed supplemental briefs, which I have considered along with the entire record in this matter, upon which I make the following supplemental findings of fact and conclusions of law, using the Board's headings:

1. Alleged Denial of Williams' Weingarten Right

There is no dispute that on June 19, 2001,[1] employee Ida Williams and her immediate supervisor, Jeff Tuesburg, had a confrontation, which resulted in Tuesburg approaching General Manager Greg Roberts and asking for a meeting with Tuesburg, Roberts and Williams. When Tuesburg told Williams they would meet with Roberts, she asked employee Kerman Clute to join them as a witness.

Roberts asked why Clute was present and was told by Williams that he was to be a witness for her. Roberts testified that he said, "Ida, this is not an investigation. You are approaching me. It would be inappropriate to have a witness being that this is not an investigation, so Kerman does not need to be here at this time."

Though I credit Roberts' testimony about what he told Williams, I also find that in fact Tuesburg and not Williams instigated the meeting. Indeed, there is no dispute about this. Whether the meeting asked for by Tuesburg was meant to be an investigation leading to possible discipline or not, it is clear that Williams could reasonably have concluded it was. This is particularly true since five days before this event she received a written discipline, which stated that the next level of discipline would be "D-Day up to and including termination."

I credit Williams' testimony that Tuesburg had initiated the meeting with Roberts. Tuesburg did not testify. Thus Roberts' stated reason to Williams for denying her a witness she knew to be untrue, which gave some immediacy to her desire for a witness.

I conclude that Williams was entitled to an employee witness under *NLRB v. J. Weingarten, Inc.,* 420 U.S. 251 (1975), *Wpilepsy Foundation of Northeast Ohio,* 331 NLRB 676 (2000).

2. *The Respondent's No-Solicitation Policy*

The no-solicitation aspect of this case was tried and briefed on the limited issue of whether the Respondent prohibited employees from talking about the Union on the sales floor and other areas. The General Counsel concedes that the Respondent's published policy proscribing solicitation by employees on the sales floor is not unlawful. However, it is alleged that this policy was unlawfully amended by General Manager Greg Roberts who is alleged to have repeatedly told employees that they could not "talk" about the Union on the sales floor and while working. The totality of evidence led me to conclude that Roberts did not tell employees they could not "talk" about the Union, as distinguished from "solicitation" for it. On this, I have been directed by the Board to address three issues:

a. The credibility of Keman Clute and Sandra Williams vs. Greg Roberts

Kerman Clute testified that at a morning meeting Roberts had with employees on May 7, "(h)e basically stated that we were not allowed to talk about the Union on the clock. We were not allowed to talk about it in the store or in the parking lot because that pertained to the no-solicitation policy as well. * * * And as far as what he was saying about the no-solicitation policy, that we weren't allowed to talk about anything that related to the Union, but we were allowed to talk about stuff like the weather or baseball or stuff like that." Clute further testified that Roberts defined solicitation "when somebody was selling something to another person."

[1] All dates are in 2001 unless otherwise indicated.

Sandra Williams testified that at a morning meeting around May 7, "Greg (Roberts) had let us know about the solicitation policy that we weren't allowed to solicit about the Union. We weren't allowed to discuss the Union. We weren't allowed to talk about Avon. We weren't allowed to sell Tupperware. We weren't allowed to – Tupperware, Avon, he gave us a description of solicitation. * * * He had told us we weren't allowed to sell Tupperware. We weren't allowed to sell Avon. We weren't allowed to sell the Union." She further testified that at subsequent meetings, Roberts would remind employees of the solicitation policy and "(w)e weren't allowed to discuss it any – union anywhere – in the parking lot. The only place we're allowed to discuss the Union was in the break room while you were on lunch break, and that if we did, you know, we could be coached and lead up to termination."

Williams testified that one time she asked Roberts if it would be all right for her to tell fellow employees about a union meeting and he told her it would.

Roberts testified, "No, I've never told them they could not talk about the Union.

Q. Do associates, in fact, talk about the Union on the sales floor?

A. All the time.

Q. And you have personally observed and heard conversation about the Union on the sales floor?

A. Yes."

Roberts further testified that he has never disciplined any employee for talking about the Union on the sales floor.

I credit Roberts' denial that he told employees they could not "talk" about the Union over the testimony of Clute and Williams. It may be that Clute and Williams used the words "talk" and "discuss" interchangeably with "solicit," and, as Williams testified ". . . like I say, it's been so long." Nevertheless, in addition to Roberts' credible denial that he told employees they could not "talk" about the Union, employees in fact did so "all the time" – a fact undenied by General Counsel or the Charging Party.

I conclude that Roberts did not, as alleged, prohibit employees from "talking" about the Union, as distinct from soliciting for it, on the sales floor.

b. The credibility of Linda Gruen vs. Jaime Durand

In paragraph 5(t) of the Consolidated Complaint it is alleged that on September 19, Roberts and Jaime Durand "promulgated an overly broad and discriminatory no-solicitation rule by prohibiting its employees from talking about the Union in the break room, on the floor, in the parking lot or at the outside picnic area of the Spring Mountain facility." As to Durand, this allegation is based on the testimony of Linda Gruen, which I neglected to address in my initial decision. The Board directed that I consider this issue and resolve the apparent credibility conflict between Gruen and Durand.

Gruen testified about a meeting held by Durand on September 19, "Jamie conducted the meeting and he said that there would be no talking about the Union on the sales floor. We

could talk in the break room on our lunch break. No talking in the parking lot. No talking outside the store in the smoking area."

Although Durand generally denied that he "ever told any associates at the Club that they can't talk about the Union," this was wrapping up his testimony concerning an incident involving Sandra Mena (in which I credited Durand over Mena). Durand was not specifically asked to testify concerning any meeting he may have had with employees on September 19, or indeed, any other time. It is therefore questionable whether Durand actually meant to dispute Gruen's testimony.

In any event, I do credit Gruen and I conclude that Durand in fact told a meeting of employees on September 19 that they could not talk about the Union on the sales floor, the parking lot or outside the store in the smoking area. By this act the Respondent violated Section 8(a)(1), and my recommended order will be amended to reflect this violation.

3. Roberts' explanation of "solicitation" vs. "talking"

In his many morning meetings with employees, Roberts reminded them about the policy prohibiting solicitation. When asked what was meant by "solicitation," as Clute testified, "He said basically the definition of solicitation was when somebody was selling something to another person." Other employees offered the same general testimony of Roberts' definition of solicitation as "selling" something or seeking support for a "cause." The Board ordered that I analyze whether the Respondent's no-solicitation policy, as explained by Roberts, "would have a chilling effect on employees' attempts to discuss union matters on the Respondent's premises" and "would coercively impair their ability to exercise their Section 7 right to discuss union-related issues at the workplace."

In *Wal-Mart Stores, Inc.*, 340 NLRB No. 76 (2003) the Board said:

> In the context of a union campaign, "'[s]olicitation' for a union usually means asking someone to join the union by signing his name to an authorization card." W.W. Grainger, Inc., 229 NLRB 161, 166 (1977), enfd. 582 F.2d 1118 (7th Cir. 1978). However, an integral part of the solicitation process is the actual presentation of an authorization card to an employee for signature at that time. As defined, solicitation activity prompts an immediate response from the individual or individuals being solicited and therefore presents a greater potential for interference with employer productivity if the individuals involved are supposed to be working. Solicitation is therefore subject to rules limiting it to nonworking time and, in the special circumstances of retail stores, to no selling areas. Slip op. 3.

As I understand the complaint and the General Counsel's theory, the no-solicitation policy published by the Respondent is valid, however, Roberts unlawfully "promulgated and enforced an overly broad and discriminatory no-solicitation rule by prohibiting its employees from soliciting for the Union" [paragraph 5(j)(1)] and promulgated an overly broad and discriminatory no-solicitation rule by prohibiting its employees from talking about the Union in the break room, on the floor, in the parking lot or at the outside picnic area. . . ." [paragraph 5(t)].

The Charging Party argues that Roberts' explanation necessarily prohibited permissible activity, or at least was ambiguous requiring the Respondent to clarify "that its policy only prohibited associates from soliciting of signatures on authorization cards while working on the sales floor."

Unquestionably, Roberts' explanation of "solicitation" was not the same as the Board's above, and no doubt was more broad in that by his definition the soliciting employee would not have to have offered an authorization card. However, this case was not tried on a theory that Roberts' explanation itself had a chilling affect on employees' rights. The General Counsel did not assert that absent the alleged prohibition against talking about the Union, Roberts' definition of solicitation was unlawful. There was no assertion that lawfully proscribed solicitation had to involve submitting an authorization card, and anything less (such as arguing for a cause) could not be prohibited.

Though not free from doubt, I conclude that Roberts' explanation of solicitation would not reasonably impair the employees' ability to discuss union related issues on the sales floor. And in fact they commonly did.

4. Polling Employees

In paragraph 5(w) Candy Proffitt was alleged to have unlawfully polled employees acting as a supervisor within the meaning of Section 2(11) and as an agent of the Respondent within the meaning of Section 2(13). I concluded she was a supervisor and that by helping draft and solicit signatures on a letter to the Union disclaiming interest in having union representation, she violated Section 8(a)(1). Having found her to be a supervisor, and therefore acting for the Respondent, I did not consider whether independently she was an agent for the purpose of drafting and circulating the letter. The Board remanded for me to do so.

Common law rules of agency apply. In order to find agency the Respondent (Roberts or some other manager in authority) would have to have given the express authority to Proffitt or would have to have done something such that employees would reasonably assume that Proffitt was acting on behalf of the Respondent. *E.g., Pan-Oston Co.,* 336 NLRB 305 (2001). Here, absent indicia of Proffitt's supervisory authority (which is really minimal) there is no evidence that the Respondent gave her the actual or apparent authority to poll employees.

Possible evidence of agency is that after the fact, the Respondent condoned Proffitt's action by publically thanking Sofia Fox, an employee who along with Proffitt and two other employees drafted and circulated the letter. I conclude such is insufficient to establish agency in this matter. But I do conclude that the Respondent committed the violation alleged because Proffitt was in fact a supervisor within the meaning of Section 2(11).

5. Confiscating Union Pens

In June, team leaders Terry Roberts and Alejandra Abril were instructed to go through filing cabinets in the membership desk area and throw away nonessential items, which they did, including union logo pens belonging to Sandra Williams. Roberts and Abril testified that they found and threw away "pens, candy, old like Christmas stuff" and so forth. They testified that employees had been told to remove from the cabinets any personal items they did not want to have discarded.

Williams testified that she was not told to remove personal items and when she found that her union logo pens were missing she noted that none of her other personal items, nor those of other employees, had been removed.

On remand I am to resolve the apparent credibility conflict between Roberts and Abril, who testified that they threw away all nonessential personal items and Williams, who testified

that only her pens were missing and that other employees' personal items remained. No other employee testified on this issue.

What actually happened is vague. No doubt Roberts and Abril threw away stuff, including the union logo pens; however, neither testified that they threw away everything, which could be construed as personal. Nor is there testimony that they discarded some material and then went back later and discarded more. I do credit Williams that when she looked, her union logo pens were gone, but other of her personal things remained as did some personal things of other employees. Accordingly, I reaffirm my finding of a violation.

6. Suspending Merit Raises

There is no dispute that the day after the Union filed a petition for an election, Roberts met with employees and announced that merit raises would be suspended pending the election. Relying on language in *Canned Foods, Inc., d/b/a Grass Valley Grocery Outlet,* 332 NLRB No. 160 (2000) I concluded that the Respondent violated the Act by announcing that merit raises would be suspended pending the election without also telling employees that such raises would be resumed regardless of the election's outcome.

Although there were some discrepancies in the testimony of all witnesses on this issue, I concluded they were not material and therefore did not pose a credibility conflict to be resolved. Specifically, I have been directed to no testimony (nor have I found any) were a witness said that Roberts told employees the suspension of merit raises "would be frozen permanently." On the other hand, I do credit Roberts' testimony:

> One of those things I mentioned, what I called laboratory conditions, and spoke to the associates and let them know that merit increases would be frozen, put on hold because of the fact the petition was filed and I didn't want, we did not want, I did not want it to look as though we were swaying someone's vote based on a discretionary increase. However, that the merit increases would be reinstated after the proposed vote.

He did not claim to have said that the increases would be resumed after the election regardless of how the employees voted, nor did anyone so testify. By this omission I conclude that in suspending merit raises the Respondent violated Section 8(a)(1) of Act since employees could reasonably believe that resumption of the merit increases would depend on their voting against the Union. The Respondent thus violated the Act.

7. Refusal to Consider Waggoner for Transfer

In the consolidated complaint, it is alleged that Mary Lou Waggoner,[2] who at the time had been reemployed about four months, was unlawfully denied transfer to a posted job for which she had applied. Crediting the Respondent's witnesses, I concluded that a one requirement for accepting an employees' application to transfer from one job to another is a minimum of six months employment. Therefore the Respondent's failure to consider her was not unlawful.

The Board remanded this issue for an analysis under *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982) to consider "record evidence that the Respondent initially offered several other reasons for its actions, proffering its

[2] He name is erroneously spelled Wagner in the record and my underlying decision.

six-month rule explanation only at the hearing." I am also to "consider the Respondents' failure to provide copies of Waggoner's job postings pursuant to the General Counsel's subpoena."

At the hearing, the Respondent's witnesses testified that a search was made and the job postings could not be located. There is no apparent dispute that in fact there were postings for full time grocery and full time bakery jobs and no dispute that Waggoner in fact signed the postings. I therefore credit her testimony that she signed the postings and on one occasion when asking why she was not interviewed, was told the postings could not be found. Such does not mean, however, that she was given this as a reason for not being transferred.

The two jobs were filled, one with a transfer of an employee from Florida. Subsequently, according to Waggoner, there have been postings for "either a full-time bakery or full-time grocery job since that time in October of last year." She did not applied for them.

Other than she was told the postings she said she signed could not be found, Waggoner was not given any reason why she was not considered for these jobs. Specifically, she did not ask anyone with the authority to transfer her why she was not considered. Although the General Counsel argues that the Respondent gave shifting and inconsistent reasons, I find none. Further, the General Counsel argues that the Respondent stated the six-month requirement for the first time at the hearing, but there is no testimony concerning when else this requirement might have been stated.

In analyzing this under *Wright Line*, I conclude that the General Counsel failed to prove a prima facie case that Waggoner was not given a full time job because her union activity, or the union activity in general. She had just been employed four months, and by her testimony, her union activity did not begin immediately. Nor was it more than perfunctory. This record does not support a conclusion that but for the union activity, Waggoner would have been transferred.

Nevertheless, assuming the General Counsel did establish a prima facie case, I conclude that the Respondent proved that she would not have been considered in any event. I credit Roberts' testimony that for an employee who applies for a transfer, that employee must have worked six months. This seems to be a reasonable rule and there is no basis on the record to conclude that it is not. Accordingly, I reaffirm my conclusion that the Respondent did not violate Section 8(a)(3) in not transferring Waggoner.

Upon the foregoing findings and conclusions, and the entire record in this matter, I reaffirm the recommended order in my underlying decision, with the following additions:

To 1 of the Order:

(h) Telling employees they cannot discuss the Union on the sales floor, the parking lot, or outside the store in the smoking area.

To the Notice:

WE WILL NOT tell our employees they cannot discuss the Union on the sales floor, the parking lot, or outside the store in the smoking area.

Dated San Francisco, California, May 25, 2004.

_____
James L. Rose
Administrative Law Judge